Editor's note: Appealed -- aff'd, sub nom. George Laden v. Morton, Civ. No. R-2858 BRT (D. Nev. Nov. 23, 1976), aff'd, No. 77-1638 (9th Cir. April 2, 1979) 595 F.2d 482

SOUTHERN PACIFIC COMPANY
HEIRS OF GEORGE H. WEDEKIND

IBLA 75-244 Decided June 12, 1975

Appeal from decision of Administrative Law Judge E. Kendall Clarke, denying application for patent pursuant to section 321(b) of the Transportation Act of 1940.

Affirmed.

1. Mineral Lands: Determination of Character of--Railroad Grant Lands--Rules of Practice: Evidence

   To establish the mineral character of railroad grant lands under the Act of July 1, 1862, 12 Stat. 489, as amended by the Act of July 2, 1864, 13 Stat. 356, it must be shown that known conditions--which may include geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are known to be accustomed to act--are such as reasonably to engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end.

2. Mineral Lands: Determination of Character of--Railroad Grant Lands--Rules of Practice: Hearings

   In a hearing on a patent application filed under the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970), the Government has the obligation of making

a prima facie case of mineral character between the date the railroad line was definitely located and the date of purchase, whereupon the applicant has the burden of establishing nonmineral character by a preponderance of the evidence.

3. Mineral Lands: Determination of Character of--Railroad Grant Lands

Land included in an application under section 321(b) of the Transportation Act of 1940 is properly determined to be mineral in character between the date the railroad line was definitely located and the date of purchase where the land was covered by mining claims, evidence of extensive and successful mining on adjacent lands was established, and the subject land had similar surface geologic conditions when compared with the surface mineralization on adjacent lands having valuable mineral deposits.

4. Railroad Grant Lands

Where land applied for pursuant to section 321(b) of the Transportation Act of 1940 was mineral in character between the date the railroad line was definitely located and the date of purchase from the railroad company, and the purchaser was chargeable with actual or constructive notice of that fact, the purchaser was not an innocent purchaser for value.

APPEARANCES: E. A. Hollingsworth, Esq., Reno, Nevada, for appellants; Otto Aho, Esq., Field Solicitor, Department of the Interior, Reno, Nevada, for the United States.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Statement of the Case

Louis J. Wedekind, on behalf of himself and other heirs of George H. Wedekind, has appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated November 12, 1974, holding that the SE 1/4 of section 29, T. 20 N., R. 20 E., M.D.M., Washoe County, Nevada, applied for pursuant to section 321(b) of

the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970), was of known mineral character between the date the Central Pacific Railway was definitely located and the date of sale by the Central Pacific (predecessor in interest to Southern Pacific Company) to George H. Wedekind, and that George H. Wedekind knew or should have known at the time of his purchase that the land was mineral in character.

This case was before the Board in Southern Pacific Co., 1 IBLA 50, 77 I.D. 177 (1970), in which the history of the case is set forth as follows:

> This appeal concerns the disposition of a 160-acre tract of public land for which the Southern Pacific Railroad has applied as part of an odd-numbered section within the limits of the grant to its predecessor, the Central Pacific Railroad Company of California, by the act of July 1, 1862 (12 Stat. 489), and the act of July 2, 1864 (13 Stat. 356). The Southern Pacific Railroad filed its application, Nevada 058575, on July 1, 1962, on behalf of the real parties in interest, the heirs of George H. Wedekind, pursuant to Section 321(b) Part II, Title III, of the Transportation Act of 1940, 49 U.S.C. sec. 65 (b) (1964). [Footnote omitted.]
>
> Under section 3 of the act of July 1, 1862, supra, the Central Pacific Railroad Company of California was granted every alternate section of public land, designated by odd numbers, up to five alternate sections per mile on each side of the railroad line, and within ten miles of each side of the line, if the land was not sold, reserved or otherwise disposed of at the time the line of the road was definitely fixed, and provided "* * * that all mineral lands shall be excepted from the operation of this act." Section 4 of the act of July 2, 1864, supra, doubled the grant from five to ten sections per mile on each side of said line, and provided, among other things, that the term "mineral land" wherever used therein, or in the original act, should not be construed to include coal or iron land, and that no land granted by that or the original act should include any other mineral land.
>
> The record shows that Central Pacific Railway Company selected the lands at issue, Section 29, T. 20 N., R. 20 E., M.D.M., Selection List No. 9 for lands in Nevada on June 28, 1895. However, before Central Pacific had received a patent for these lands, it

issued a quit-claim deed to George H. Wedekind for the sum of $800.00 on February 18, 1901, transferring its interest in the SE 1/4 of Section 29. The Central Pacific's selection of Section 29 was subsequently denied by the Department in 1916, pursuant to hearings completed in January 1912, Central Pacific Railway Co., 45 L.D. 25 (1916), rehearing denied, 45 L.D. 27 (1916), affirmed, Central Pacific Railway Co. v. Lane, 46 App. D.C. 372 (D.C. Cir. 1917). The basis for the denial was that all the lands in the section were mineral in character and, therefore, excluded under the terms of the act of July 1, 1862 (Section 3), and the act of July 2, 1864 (Section 4).

The appellant filed its present application under the Transportation Act of 1940, supra, asserting that patent to the SE 1/4 of Section 29 should issue to the Southern Pacific Railroad on behalf of the heirs of George H. Wedekind based on the quit-claim conveyance to Wedekind as an innocent purchaser for value from the railroad in 1901. [Footnote omitted.]

Section 321(b) of the Transportation Act provides that if any land grant railroad wishes to take advantage of charging higher rates for carrying Government traffic, it must file a release of any claim it might have against the United States to lands granted to the railroad. It is provided, however, that nothing in Section 321(b) should be construed

> * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

The Southern Pacific Company and its predecessor, the Central Pacific, filed such releases, specifically excepting lands sold to innocent purchasers for value.

By a decision of January 30, 1969, the Nevada Land Office rejected the application under the Transportation Act because the lands applied for had been determined to be mineral in character by the Department in 1916 and by the courts, citing U.S. v. Central Pacific Railway Co., D-31706-B, List No. 9, Serial

> 01223, affirmed by the Supreme Court of the District of Columbia (Equity No. 34359) and the Court of Appeals of the District of Columbia in Central Pacific Railway Co. v. Lane, No. 3008, 46 App. Cases 372 (1917). It held that the lands in Section 29 were not subject to the original railroad grant, and in accordance with the regulations under the Transportation Act * * * [footnote omitted] rejected the application.
>
> The Office of Appeals and Hearings dismissed the appeal from the Land Office decision on the ground that the doctrine of res judicata or its administrative law counterpart, the doctrine of finality of administrative action, applied to this case, preventing further consideration of an appeal by the Southern Pacific Company.

Id. at 51-53, 77 I.D. at 177-79.

The Board held that the doctrine of res judicata did not apply in the instant case because the earlier Departmental decision in 1916 did not involve the same issues and facts which were determinative of the acceptability of appellants' patent application. The Board concluded,

> Before a decision can be reached in this case, a determination must be made as to the character of the land from the date the railroad line was definitely located to the date of purchase and whether the purchaser from the railroad was an "innocent purchaser" for value. This has not been done.
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> * * * * * * *
>
> [T]he Bureau's decision is set aside and the case is remanded for the purpose of a hearing. At the hearing, competent evidence should be adduced as to the character of the lands from the time the railroad line was definitely located to and including the time of the purchase from the railroad. In the event it is determined that the land was mineral in character at any time during such period, evidence should be received relating to the bona fides of the purchaser.

Id. at 54, 55, 77 I.D. at 179-81.

On April 23, 1973, the heirs of George H. Wedekind filed an action in the United States District Court in and for the State of Nevada to compel issuance of a patent to said heirs. By "Order Denying Summary Judgment" dated June 20, 1974, in George C. Laden v. Morton, Civil No. R-2858 (BRT) (D. Nev.), the court ordered that the Department of the Interior complete "final agency action"

on the subject patent application by December 20, 1974. The Government filed a "Motion for Modification of the Order" to allow the Department until June 20, 1975, within which to complete final action. By Order dated January 15, 1975, the court granted the Government's motion.

Pursuant to the Board's decision in Southern Pacific Co., supra, a hearing on the matter was held before Administrative Law Judge Clarke on September 4, 1974. By decision dated November 12, 1974, Judge Clarke held that the United States had made a prima facie showing that the subject land was mineral in character between the critical dates, and further found that George H. Wedekind was not a bona fide purchaser for value because he knew or should have known that the land in question was mineral in character. Judge Clarke also found that the evidence presented by the patent applicant had not rebutted the prima facie case of the United States.

On appeal, appellants maintain that: (1) the Administrative Law Judge erred in determining that the subject land was mineral in character at any time herein relevant; (2) assuming the land was mineral in character during the relevant period, the Administrative Law Judge erred in determining that George H. Wedekind was not an "innocent purchaser for value;" and (3) the determinations of the Administrative Law Judge are not supported by the record.

Upon review of the voluminous record in this case, we concur in the findings of Judge Clark. Accordingly, the decision below is affirmed.

Statement of the Facts

A discussion of some facts not recited in the earlier Board decision will clarify the basis for our determination.

Sometime in 1896, the "Wedekind strike" was discovered in the NW 1/4 of section 33 by George H. Wedekind. Shortly thereafter, Wedekind located the first mining claim in the area, the Reno Star. (Ex. 18). On April 10, 1901, Wedekind located the Safeguard claim (Ex. 20), which covered the strike in section 33 and in addition extended into the southeast corner of the SE 1/4 of section 29.

By letter dated March 24, 1911, the Central Pacific Railroad Company (CPRC) was notified that the Department had determined that section 29 was mineral in character. CPRC filed an answer denying the charge but the denial did not extend to the E 1/2 SE 1/4 of section 29. In a subsequent appeal brief (from the Register and

Receiver's decision of January 29, 1915), CPRC specifically admitted the E 1/2 SE 1/4 of section 29 was mineral in character, while noting it had deeded the entire SE 1/4.

At the hearing held in 1912, the Government called ten witnesses, all of whom were experienced miners who had prospected and located claims on section 29. Many of these witnesses had been working in the area for ten years or more and were familiar with the Wedekind District during the critical period in this case. All agreed that the subject land was potentially valuable for mineral development due to its proximity to the Wedekind strike and the general similarity in surface mineralization. CPRC called two expert witnesses, both of whom were land and mineral examiners for the railroad company. Both witnesses expressed the belief that the subject land was not mineral in character based upon sampling and assay reports, and their opinion that years of prospecting and the geology of the area did not establish the existence of valuable mineral deposits.

On January 29, 1915, the Register and Receiver issued a decision finding that, while the testimony was conflicting, the evidence showed that material carrying sufficient mineral value to justify further expenditures was found on the subject land. CPRC appealed, and the Commissioner of the General Land Office affirmed holding that while the evidence did not demonstrate that a discovery of mineral had been established, "[t]he preponderance of the evidence considering the number of witnesses, their acquaintence [sic] with the land, their experience as miners and prospectors, the indications of mineral on and near the land as testified to by them, establishes that the land has a prima facie mineral character * * *."

CPRC took an appeal from the Commissioner's decision, which the Secretary later affirmed in Central Pacific Ry. Co., 45 L.D. 25 (1916). The Secretary held, in part, that a showing had been presented which was sufficient to warrant classifying the land as mineral in character despite the fact that the evidence was insufficient for finding a discovery of a valuable mineral deposit. Thereafter, CPRC appealed to the courts where the Secretary's position was affirmed.

No further action took place with respect to the subject land until July 1, 1962, when the Southern Pacific Company filed its patent application, Nevada 058575, on behalf of the appellants. On November 7, 1962, Alexander M. Peterson, a BLM geologist, submitted a mineral report on the SE 1/4 of section 29. After extensive excerpting from Theodore D. Overton, "Mineral Resources of Douglas, Ormsby and Washoe Counties," Univ. of Nev. Bull. Vol. XLI, No. 9, Dec. 1947, pp. 83-85 (Ex. 17), and Henry C. Morris, "Hydro-thermal

Activity in the Veins at Wedekind, Nevada," Engineering and Mining Journal 76, 1903, pp. 275-76 (Ex. 18), Peterson concluded that the SE 1/4 was mineral in character based upon the geologic information supplied in the articles. The report, however was never approved by the Department.

In 1963 the appellants inquired about the status of the railroad selection and were informed by letter, dated February 11, 1963, that the lands applied for were embraced by unpatented mining claims within the Wedekind mining district and in the event the land was found to be nonmineral in character, adverse action would be initiated against the claims to clear the land for patent. There followed considerable delay in processing the application due to uncertainty and a protest regarding the successors in interest to George H. Wedekind.

On October 14, 1966, H. W. Mallery, a BLM geologist, submitted a mineral report on the SE 1/4 of section 29, which was to "supplement" that previously written by Peterson. In the report he stated, in part, the following:

> The acceptance or rejection of this application is basically contingent upon an evaluation of the selected lands with respect to their potential to contain significant deposits of valuable minerals. * * *
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> * * * * * * *
>
> The subject lands are nonmineral in character. [Emphasis in report.] Despite the fact that the selected lands are situated in or adjacent to what is known as the Wedekind mining district it is the writer's opinion that as of this date [emphasis added] the lands do not contain mineral deposits of a magnitude that would make this tract, or any portion thereof, more valuable for the extraction, processing and marketing of these minerals than for any other purpose.
>
> Over the years the subject tract was undoubtedly covered by many generations of mining claims * * *. In a word the lands have been apparently repeatedly staked and presumably prospected rather thoroughly but no ore deposits, per se, have been discovered other than those mined in the Wedekind Mine proper years ago. (Some of these underground workings may have extended a limited distance into the extreme southeasterly corner of the subject lands * * *.)

After examining the mining locations on the land, the writer recommended that contest actions be initiated against the claims on the grounds that no discovery had been effected on each or any of them and that the lands involved were presently nonmineral in character. Mallery's report was approved by the Department on October 25, 1966.

On May 4, 1967, Mallery submitted a mineral report on the mineral character of the SE 1/4 of section 29 "as of February 18, 1901." After extensively excerpting from the articles cited in the Peterson report, and listing the numerous mining claims located in the Wedekind District at the turn of the century, plus the fact that the Wedekind Mine apparently extended into the southeast corner of the SE 1/4 of section 29, Mallery concluded that, "the subject lands * * * would have been undoubtedly classified as mineral in character as of February 18, 1901." Mallery's second report was approved on January 24, 1969.

By decision dated January 30, 1969, the Nevada State Office informed appellants that under the guidelines set forth in Southern Pacific Co., 71 I.D. 224 (1964), favorable action could be taken on the patent application only if (1) the land was not mineral in character at the time of the sale, or (2) if the land was mineral at that time, the vendee was an innocent purchaser and not chargeable with actual or constructive notice of the mineral character of the land. In researching the history of the area, the Bureau discovered the 1916 Departmental adjudication and subsequent court affirmance. Accordingly, appellants' application was rejected because the mineral character of the land had already been established by earlier adjudication. Appellants appealed from this decision and began the lengthy process, recited above, which has led to the case being now before the Board.

We come now to Judge Clarke's decision. As a basis for his determination that the lands in question were mineral in character during the critical dates in issue, Judge Clarke noted the following:

> Certainly the conditions of geology as they exist on the ground now were the same as existed on the ground during the critical period. Harrie W. Mallery, a qualified mining geologist and engineer, testified on behalf of the United States that he had been familiar with and made investigations of a geological nature in the area in question for at least the last 10 years. (Tr. 13).
>
> To portray the geological information which he gathered, Mr. Mallery prepared Exhibits 22 through 25.

* * * * * * *

> * * * An examination of these documents shows clearly that the areas which were the most favorable for mineralization from a geological standpoint cover rather fully the land which is the subject of this hearing as well as adjacent lands from which actual production was recorded.

In addition to the testimony concerning the geology of the area in question, Judge Clarke took note of the large number of mining claims which were located in 1900 and 1901 within the Wedekind District (Ex. 20), and the extensive amount of shafts, tunnels, cuts and other workings in the general area (Exs. 13, 14, 15). He also noted that C. L. Crane had testified at the 1912 hearing that he had paid $2,500 for two claims in the SE 1/4 of the section (Ex. 1). The Judge found that the testimony presented on behalf of the patent applicant showed that the discoveries from which the production was recorded in the general area were not located on the SE 1/4 section 29, but rather came from sections adjacent to the east and south. (Decision at 8). The Judge determined, however, that the evidence indicated that the geology of the area is presently the same as it was between 1864 and 1901, and shows surface mineralization to the same degree on the land in question as on the properties which actually produced valuable minerals. Accordingly, Judge Clarke concluded that the Government had presented a prima facie case that the SE 1/4 of section 29 was mineral in character between the critical dates, and appellants had failed to rebut the Government's case by a preponderance of the evidence. The Judge also found that George H. Wedekind was not a bona fide purchaser for value because he knew or should have known that the land in question was mineral in character.

Applicable Law

[1] The first issue before this Board concerns the "mineral character" of the subject land between the date the railway was definitely located and the date of purchase by George H. Wedekind. In Central Pacific Ry. Co., 43 L.D. 545, 547 (1914), the Department held that, "if any evidence of mineral is found upon the land, and the showing is sufficient, in the opinion of prudent and qualified persons, to warrant further exploration and expenditure, with reasonable prospect of success, the land cannot be classified as nonmineral * * *."

In United States v. Southern Pacific Co., 251 U.S. 1, 13-14 (1919), the Supreme Court elaborated further on the criteria used for determining whether land is mineral in character. The Court stated that it was sufficient to show only that known conditions

are such as reasonably to engender the belief that the land contains mineral of such quality and quantity as to render its extraction profitable and justify expenditures to that end. See also Diamond Coal & Coke Co. v. United States, 233 U.S. 236, 240 (1914). Later, in Southern Pacific Co., 71 I.D. 224, 233 (1964), the Department stated that such a belief could be predicated upon geological conditions, discoveries of minerals in adjacent land and other observable external conditions upon which prudent and experienced men are shown to be accustomed to act. The Department also noted that to meet the "mineral in character" test it was not essential that there be an actual "discovery" of mineral on the land. See United States v. California, 55 I.D. 532, 542 (1936).

In State of California v. Rodeffer, 75 I.D. 176, 180-81 (1968), the Department reviewed the long-standing distinction between the test for finding a "discovery" and the test for finding land to be "mineral in character:"

> The Department has long held that the discovery of a valuable mineral deposit can be demonstrated only by the physical exposure within the limits of a mining claim of the mineral deposit for which the claim is alleged to be valuable and that inference of the presence of valuable minerals, drawn from the proved existence of mineral deposits outside the limits of the claim or from the geology of the area, cannot be substituted for an actual exposure of a mineral deposit within those limits. [Citations omitted.] On the other hand, the mineral character of land may be established by geological inference without the exposure on the land of the minerals believed to be found therein.

Recently, the Board reaffirmed earlier Departmental decisions which held that in a mineral character determination the belief that lands contained mineral of such quality and quantity to render its extraction profitable and justify expenditures to that end could be adduced by evidence less certain than that required in a discovery ascertainment proceeding. United States v. Meyers, 17 IBLA 313 (1974); United States v. Tobiassen, 10 IBLA 379 (1973).

[2] With respect to the evidence which must be shown to establish the mineral character of the land, the first burden falls upon the Government to present a prima facie case that the land was mineral in character during the critical period in issue. Thereupon, the burden shifts to the patent applicant to show by a preponderance of the evidence that the land in question was not mineral in character. United States v. Tobiassen, supra at 384.

Conclusion

[3] We agree with Judge Clarke's finding that the Government established a prima facie case that, during the critical period, the subject land was mineral in character in light of the evidence adduced concerning mining activity on adjacent lands, location of mining claims on the subject land, and the existence of similar surface geologic conditions on the subject land when compared with the surface conditions on adjoining lands having valuable mineral deposits. As pointed out in United States v. Meyers, supra at 320, "The combination of proven values in one area plus application of geological principles and techniques that show similar conditions in an adjacent area can give rise to the inference that the adjacent area is mineral in character." Appellants' showing that the subject land did not contain discoveries of valuable mineral deposits was insufficient to rebut the Government's prima facie case of mineral character.

[4] Next, we come to the issue of whether George H. Wedekind was an innocent purchaser for value within the meaning of section 321(b) of the Act. The history of this case clearly indicates that Wedekind knew of the mineral quality of the land when he made his purchase. The record is replete with evidence of extensive mining activity on the subject land and adjacent lands both by Wedekind and numerous other miners. We therefore concur in Judge Clarke's finding that the elements of lack of notice and presence of good faith at the time of the purchase are absent in the present case. Accordingly, George H. Wedekind was not an innocent purchaser for value under section 321(b) of the Act. United States v. Tobiassen, supra at 387-88.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

_____
Martin Ritvo
Administrative Judge

I concur in the result:

_____
Douglas E. Henriques
Administrative Judge

ADMINISTRATIVE JUDGE THOMPSON CONCURRING:

I agree with the findings and conclusions of Judge Ritvo. I believe there are additional reasons for denying the appellants' application for patent, and I also wish to stress certain points. It is evident that if the railway company were appearing here solely in its own behalf it would be barred by the doctrine of administrative finality from insisting that the question of the mineral character of the land be reopened, in addition to the fact it released its claims to public land under section 321(b) of the Transportation Act of 1940, 49 U.S.C. § 65(b) (1970). That section of the Act provided, however, that nothing therein should be construed

> * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

Department regulation 43 CFR 2631.0-8 says, in pertinent part:

> * * * Subsection (b) of section 321 authorizing the issuance of such patents is not an enlargement of the grants, [to the railroads] and does not extend them to lands which for various reasons, such as mineral character, prior grants, withdrawals, reservations, or appropriation, were not subject to the grants. * * *

By that interpretation of the Transportation Act of 1940, mineral lands could not be conveyed to an innocent purchaser from the railway company. A prior statute, section 5 of the Act of March 3, 1887, 43 U.S.C. § 898 (1970), provides in part that where certain lands sold by the railroad were excepted from the operation of the grant to the railroad company,

> * * * it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns * * *.

That section and other sections of the Act (see 43 U.S.C. § 894-899) prescribe certain limitations and conditions for adjusting rights to land where railroad grants and selections are involved. Therefore, whatever rights were preserved in an innocent purchaser under the Transportation Act of 1940, must be resolved in accordance with the conditions and limitations prescribed by the Act of March 3, 1887, as well. See Southern Pacific Company, 71 I.D. 224, 229, 231 (1964), recognizing the ruling in Clogston v. Palmer,

32 L.D. 77 (1903), that the determination of the bona fides of a purchaser under the 1887 Act is to be determined as of the date of the purchase from the railroad company, and holding that the case is still in effect as to grant lands determined to be mineral in character for minerals not covered by the Act of July 17, 1914, 30 U.S.C. § 121-123 (1970). 1/

There have been delays in this case in addition to those arising since this particular patent application was filed in 1962. The railway company first filed its selection list (patent application) June 28, 1895, which included the land in question. It sold the SE 1/4 to George H. Wedekind in February 1901. The selection list was challenged by the Department (the General Land Office) March 24, 1911, and a hearing was held in 1912. The railroad company did not deny that the E 1/2 SE 1/4 was mineral in character. Instead, in its appeal from the decision of by the Register and Receiver declaring the SE 1/4 to be mineral in character it specifically stated that it admitted the E 1/2 SE 1/4 was mineral in character. The Departmental decision, Central Pacific Railway Co., 45 L.D. 25, 27 (1916), sustained, Central Pacific Railway Co. v. Lane, 46 App. D.C. 372 (D.C. Cir. 1917), upheld the finding, which was appealed, that the W 1/2 SE 1/4 was mineral in character. Although the 1887 Act would have permitted a bona fide purchaser from the railroad company to apply for patent after the final determination that the land was excepted from the railroad grant, the heirs of the purchaser (who died in 1905) from the railroad apparently did nothing until 1962, more than 20 years after the Transportation Act and more than 45 years after the Department's determination of the character of the land.

1/ I am assuming for the purpose of this opinion that the Transportation Act of 1940 did not impliedly repeal or supersede the 1887 Act, but that the 1940 Act only preserved such rights as could have been perfected under the existing law, including the 1887 Act, but for the releases made by the railroad companies under the 1940 Act. Otherwise, under the interpretation in regulation 43 CFR 2631.0-8, lands mineral in character, no matter when that determination was made, could never be conveyed to a railroad company's innocent purchaser for value. The Southern Pacific Company opinion, supra, does not raise this issue, but merely concludes that the Clogston v. Palmer ruling applies to cases arising under section 321(b) of the Transportation Act, and that section 321(b), like section 5 of the 1887 Act, modifies the general rule in Barden v. Northern Pacific R.R., 154 U.S. 288 (1894), that at any time prior to issuance of a patent to the railroad it is determined that the land is mineral in character the grant must fail as to that land.

When this case was remanded by this Board for a hearing, Southern Pacific Co., 1 IBLA 50, 77 I.D. 177 (1970), it was assumed that the heirs of Mr. Wedekind were not actually parties or were not represented in the earlier proceedings pertaining to the company's patent application. I believe more should have been required of the heirs before reopening this matter. In the future, I suggest that such heirs (or other transferees) should be required to make an evidentiary showing that the purchaser was not actually represented by the railway company. Furthermore, I believe they should also be required to show why their application should not be rejected and the matter not reopened under an administrative doctrine equivalent of laches.

In discussing section 5 of the Act of 1887, the Supreme Court has stated that the Act permitting bona fide purchasers to purchase lands excepted from the grant to the railroad companies "is not a curative one, confirms no title, but simply grants a privilege." Ramsey v. Tacoma Land Co., 196 U.S. 360, 363 (1905). Furthermore, the Court assumed that the privilege does not continue indefinitely, but that the purchaser must act within a reasonable time. Id. 2/

In United States ex rel. Givens v. Work, 13 F.2d 302 (D.C. Cir. 1926), cert. denied, 273 U.S. 711, a purchaser from a railroad company took no steps to obtain a patent for the land between the date of a final court decree adjudicating the grant and rights thereunder in 1902 and 1917 when he conveyed his interests to another, who promptly filed her application to purchase under section 5 of the 1887 Act. The court held that the transferee of the purchaser from the railroad took no greater rights than he, and could not cut off any equities accruing to the United States through the laches of the purchaser, but acquired only whatever rights the purchaser had. In discussing the application of laches to preclude the right to purchase in Givens, the court quoted, at 364, from Galliher v. Cadwell, 145 U.S. 368, 373 (1892), that cases applying laches

> * * * all proceed upon the theory that laches is not, like limitation, a mere matter of time, but principally a question of the inequity of permitting

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2/ In that case the purchaser filed its application ten months after action rejecting the railroad company's list. The Court upheld the Department's award of the land to the purchaser in the face of a challenge by another, indicating (at 364) that some time must be allowed for acquiring knowledge of the situation and determining the course of action where there was not any express limitation of time prescribed in the statute for making application.

> the claim to be enforced -- an inequity founded upon some change in the condition or relations of the property or the parties.

Further, the case quoted:

> * * * And the question of laches turns, not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during the lapse of years. It is true that, by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

The heirs of George H. Wedekind acquired no greater rights than he had. While laches was not raised in the proceedings below, I believe it should have been. There should have been an inquiry as to what has transpired concerning the land over the years. Apparently there are now no improvements on the land, although there were for some years immediately after Wedekind purchased the land from the railroad company.

In any event, the delay should not redound to appellants' benefit by lessening their burden of proof to establish the lack of mineral character of the land in 1901, or to establish the good faith or bona fides or "innocence" of George H. Wedekind when he purchased the land from the railway company. The Department long required a strong evidentiary showing by one claiming rights under the public land laws. In the early Departmental case deciding the mineral character of the land, the Department stated, at 45 L.D. 26, citing Central Pacific Ry. Co., 43 L.D. 545 (1914),

> * * * that when the character of land selected by the railway company is put in issue, the burden is on the company to show by clear and convincing evidence that the land is of a character subject to the grant.

Appellants' burden should be no less now. If there are doubts about the character of the land in 1901 engendered by the delay, those doubts should be resolved to benefit the Government in these circumstances. We have a final Departmental decision made nearly 60 years ago that the W 1/2 SE 1/4 was mineral in character. In addition, the railway company admitted in its brief to the Department from the Register and Receiver's decision that the E 1/2 SE 1/4 was mineral in character. Even assuming that admission is not binding upon its purchaser, these circumstances certainly compel us to examine the evidence very carefully and not to discard lightly the previous finding and the admission.

The determination that the land was mineral in character in 1901 was based primarily upon geological inferences that surface indications and values found on adjoining lands extended into the SE 1/4. Geological inferences may be a predicate for determining that the land is mineral in character, but cannot serve as a basis for concluding that there has been a discovery of a valuable mineral deposit by a mining claimant as required to validate a mining claim. State of California v. Rodeffer, 75 I.D. 176, 180-81 (1968). The earlier Departmental decision in this case recognized that there was insufficient evidence of a discovery of a valuable mineral deposit under the mining laws. Even where there have been discoveries of valuable mineral deposits, but economic circumstances change so that the deposits are no longer valuable, a discovery is no longer sustainable. United States v. Denison, 76 I.D. 233 (1969); Mulkern v. Hammitt, 326 F.2d 896, 898 (9th Cir. 1964). Likewise, changes in the circumstances giving rise to geological inferences may require a change in a determination that land was mineral in character. Changing uses of land may render mining and even prospecting activities uneconomical or impracticable. This land is within the growing metropolitan area of Sparks-Reno, Nevada. Adjoining the land in part is a residential area. Values of the land for purposes other than mining have undoubtedly soared over the years.

The primary reason for doubting the earlier determination that the land was mineral in character is the testimony and opinion by the Government's mineral examiner to the effect that the land is not mineral in character now. The major predicate for this opinion is due to his failure to find more than surface indications of mineral and the fact that there has not been mining activity on this land or nearby land for many years. The same examiner gave his opinion that the land was mineral in character in 1901 based upon the information available at that time. His opinion of the present character of the land should not serve as a basis for concluding that his opinion of the character of the land in 1901 is erroneous. The two opinions are not as a matter of law or fact necessarily inconsistent. Appellants' evidence adds little, if anything, to the evidence submitted at the earlier hearing regarding the issue

of mineral in character. There is not a sufficient evidentiary basis for finding contrary to the previous determinations that the land was not mineral in character in 1901.

The issue of the good faith of the purchaser puts into focus the problem of proof some 70 years after his death. His granddaughter testified for appellants. Though her testimony offers an explanation for his purchase which is consistent with a view that he thought it was not mineral in character, more compelling is the fact he had located mining claims in the area and, indeed, on the subject land. While a mining claimant may file a mining claim and not honestly believe in his own mind that the land is mineral in character, a notice of location is, at least, an assertion that there are believed to be minerals within the land, and is a notice to the world of his claim to the land based upon a discovery of minerals. In United States v. Central Pac. R. Co., 84 F. 218, 221 (C.C., N.D. Cal. 1898), the court found good faith was "entirely wanting" on the part of a purchaser from a railroad where he, with others, had filed a mining location upon the same land which he contracted to buy from the railroad. I cannot see how we can conclude otherwise in the present case, and therefore, agree with the finding of Judge Ritvo and the Administrative Law Judge on this issue also.

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Joan B. Thompson
Administrative Judge